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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~No. 1775~~ 70-231

TOWN OF HARRISON,

Petitioner,

against

LETITIA E. MYERS, as Administratrix of the Goods, Chattels and Credits which were of CHARLES E. MYERS, deceased,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. .....

LETITIA E. MYERS, as Administratrix of the Goods, Chattels and Credits which were of CHARLES E. MYERS, deceased,

Respondent,

against

TOWN OF HARRISON,

Petitioner,

and

THE CITY OF WHITE PLAINS, MVAIC, ORIENTA BUS LINES, INC., ARTHUR PELCHAT, and WILLIAM SMITH,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

TOWN OF HARRISON, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on February 16, 1971.

Citations to Opinions Below

The judgment of the District Court was without opinion on the issue of liability, is unreported, and is printed in Appendix A. The opinion of the Court of Appeals is still unreported, and is printed in Appendix A. The order of the Court of Appeals denying petition for rehearing was without opinion, is unreported and is printed in Appendix A.

Jurisdiction

The judgment of the Court of Appeals was entered on February 16, 1971. Rehearing was denied on March 5, 1971. The jurisdiction of this Court is invoked under 28 U.S.C., section 1254(1).

Questions Presented

1. Are the decisions below in conflict with the law of the State of New York with respect to proximate cause and the standard of care required of police officers in close pursuit of a suspected car thief who, while fleeing at high speed, kills a bystander?

2. Have the District Court and the Court of Appeals so far departed from accepted judicial practice and procedure as to call for an exercise of the Supreme Court's power of supervision?

Statute Involved

New York Vehicle and Traffic Law, section 1104; L. 1959, c. 775, eff. October 1, 1960:

(a) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit

of an actual or suspected violator of the law or when responding to but not returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(b) The driver of an authorized emergency vehicle may:

1. Stop, stand or park irrespective of the provisions of this title;

* * * *

3. Exceed the maximum speed limits so long as he does not endanger life or property;

* * * *

(d) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

Statement

The Respondent brought an action for the wrongful death of her husband. The jurisdiction of the District Court was invoked because of diversity of citizenship and amount in controversy. The decedent was killed when he was involved in an automobile accident with a suspected car thief, defendant Smith, who was fleeing at high speed from the police, who were in close pursuit.

The policemen were all employed by the Petitioner and were engaged in the performance of their duties. The jury awarded the Respondent a verdict in the amount of $481,250.00. The trial court granted interest from the date of death, pursuant to the applicable New York statutes, and judgment was entered on January 16, 1970 for $607,440.18. The Court of Appeals affirmed on the issue of liability and reversed and remanded for a new trial on the issue of damages only.

The accident happened on September 21, 1963, at about 1:30 A.M., on North Street in White Plains, New York. North Street is a four lane highway running north and south with a shoulder on the northbound half, and the opposing lanes of traffic, two in each direction, separated by a double white line. The decedent, engaged in his part-time occupation as taxicab driver, was proceeding in a northerly direction when he came abreast of a police car parked in the southbound portion of the highway and facing in a southerly direction. The police car was operated by Officer Fiore, who had his revolving red dome light in operation. The decedent stopped alongside the police car, apparently for no other reason than curiosity. Both the decedent and Officer Fiore were seated in their respective vehicles. Officer Fiore admonished the decedent to get out of the way. When the decedent did not comply, Fiore left his vehicle and repeated his admonition. Just at that moment the fleeing stolen car appeared over the crest of the hill about 700 to 800 feet to the south. The stolen car, travelling at about 90 miles per hour, crashed into both the police car and the taxicab. Officer Fiore just managed to jump out of Smith's path. Mr. Myers was killed instantly by the impact.

The pursuit that ended with the accident began in downtown Harrison, several minutes earlier, when an unidentified motorist complained to Officer Porto that another motorist had struck his car and fled. When the hit-and-run car happened by, it was pointed out to Porto by this man, and Porto gave chase. Although Officer Porto had his dome light and siren on, and at one point got alongside the fleeing car, the driver, Smith, failed to stop, but on the contrary accelerated, and maintained speeds of 80 to 100 miles per hour throughout his flight. Officer Porto couldn't catch Smith, and at his radio request to headquarters for assistance, Officer Tolve took up the chase, but he couldn't catch Smith, either. Headquarters also dispatched Officer Angarano to assist in getting Smith. He positioned his car on North Street, and when he saw

Smith approaching, with Officer Tolve behind him flashing his red light, he attempted to stop Smith by slowly moving his own vehicle from side to side of the road. However, Smith managed to elude Officer Angarano and sped on. In the meantime, Harrison Police Headquarters had ordered Officer Fiore to take up a stationary position on North Street about a quarter of a mile from the accident site. On his own initiative he moved to his final position, where the accident occurred.

The pursuit covered a total distance of about five miles, and lasted about three or four minutes. During its course Smith sped through red traffic lights, and the four pursuing officers learned through radio communication with headquarters that the fleeing car was reported stolen.

Reasons for Allowing the Writ

1. This case is of vital concern to every law-abiding person in the United States. By misconstruing the law of the State of New York the courts below have stripped the police of certain safeguards designed to enable them to function effectively in enforcing the law and apprehending violators.

Peace officers are caught in a difficult dilemma. They are under a sworn duty to uphold the law and detain violators. If they fail to act, not only are they subject to censure, but the public suffers from lack of protection. On the other hand, if, in the process of performing their duty to uphold the law and protect the community a motor vehicle accident occurs, they are subjected to the burden of a civil suit for damages. The problem was well stated in *Wrubel* v. *State*, 11 Misc. 2d 878 (1958), which was also a case involving an automobile accident caused by a suspect fleeing from the police. The court said at pages 880 and 881:

> If officer Marchione had abandoned his duty and the Buick car had proceeded unmolested and a serious acci-

> dent had resulted, he would have been subjected to severe criticism for failing to perform his duty to which the public is entitled. (Any automobile on the highway could have been involved in such an accident —even claimant's automobile.) It would be most unwise to discourage police officers in time of emergency. Such a course would tend to lessen law enforcement.
>
> In any emergency a police officer must do his duty. He should not be careless or reckless. He should act in a prudent and in as careful a manner as he possibly can. He should not be hesitant and should act promptly and resolutely. Reluctance to act in an emergency might indeed result, to some extent, in stripping the community of proper and adequate protection against malefactors.

The effect of the decisions below is undeniably to bring about the very evils denounced in *Wrubel,* to cause the police to hesitate and reflect, possibly at the risk of their lives and the lives of others, whether their actions, under stress, may possibly leave them in a position where they can be exposed to subsequent lawsuits and at the mercy of unsympathetic, sometimes hostile juries, and highly skilled and experienced lawyers, with possible further repercussions from their superiors.

2. The Court of Appeals has misinterpreted the decision in *Stanton* v. *State,* 29 A. D. 2d 612, affirmed 26 N. Y. 2d 990 (1970). That case also involved a claim arising out of the death of a motorist caused by a collision with another motorist fleeing from the police. The Court of Claims dismissed the claim and both the Appellate Division and the Court of Appeals affirmed. The Second Circuit committed reversible error in two respects in misinterpreting and misapplying the law of *Stanton* and related cases. The first error is that the Court viewed the decisions in *Stanton* as nothing more than affirmations of findings of

fact by a court in a non-jury trial, and considered its own task as simply determining whether there was sufficient evidence to justify submitting the instant case to the jury, whose decision on questions of fact would not be disturbed. To use the Court's own words:

> . . . the court in *Stanton* was reviewing a non-jury trial in the Court of Claims where the trial judge had decided as a question of fact that the pursuing trooper was not negligent or reckless. Here, on the other hand, the trier of fact has found such negligence on the part of appellant, and the only question before this court is whether there was sufficient evidence on this question to allow it to be submitted to the jury. Appendix A, *infra,* pp. 22, 23.

On the contrary it is clear that the Appellate Division decided *Stanton* as a matter of law.

> The majority view expressed in other jurisdictions in similar cases holds that a police officer is not liable for damage caused by a vehicle being pursued by the officer in the performance of his duties. (83 A.L.R. 2d 452; *Pagels* v. *City and County of San Francisco,* 135 Cal. App. 2d 152, 286 P. 2d 877; *Draper* v. *City of Los Angeles,* 91 Cal. App. 2d 315, 205 P. 2d 46; *United States* v. *Hutchins,* 6 Cir., 268 F. 2d 69; *Roll* v. *Timberman,* 94 N. J. Super. 530, 229 A. 2d 281; *Chambers* v. *Ideal Pure Milk Co.,* 245 S. W. 2d 589 [Ky.].)

Id. at 613, 614.

Every one of the above cited cases held as a matter of law that no cause of action lay against the pursuing police. The Appellate Division in *Stanton* adopted the reasoning in *Roll* v. *Timberman* when it stated at page 614:

> In the case of *Roll* v. *Timberman* (*supra,* p. 536), with facts similar to the case here, the court stated as follows: "The reasoning which underlies the rejection

> of liability in these cases is two-fold: (1) it is the duty of a police officer to apprehend those whose reckless driving makes use of the highway dangerous to others; (2) the proximate cause of the accident is the reckless driving of the pursued, notwithstanding recognition of the fact that the police pursuit contributed to the pursued's reckless driving."

The New York Court of Appeals adopted this reasoning by affirming the Appellate Division in a memorandum opinion. Thus, the law of the State of New York, as adopted by its highest court, is that as a matter of law the pursuit by the police was not the proximate cause of Mr. Myers' death.

If there is still any question that *Stanton* was decided as a matter of law, and not as the affirmation of a finding of fact, as the Second Circuit maintains, all doubt is resolved in the subsequent case of *Dunn* v. *State,* 34 A. D. 2d 267. That case, decided June 2, 1970, was not considered by the Second Circuit on the appeal, but was cited in the petition for rehearing. The Appellate Division, Third Department, interpreting its own decision in *Stanton* stated at pages 268 and 269:

> We agree that no lability should be predicated upon the troopers' pursuit of the stolen car. Appellants' argument in this regard can be broken down into two parts: (1) that Proper would not have driven the car in a reckless manner if he were not being pursued, and (2) that the police were under a duty to warn persons upon the highway of the imminent approach of the fleeing automobile.
>
> We considered, and rejected, similar arguments in *Stanton* (citation omitted). We reasoned that the trooper had a duty to apprehend the traffic violator and prevent him from doing any harm to innocent users of the highway; that he had acted in as prudent and careful a manner as possible under the circumstances; and

that the sole proximate cause of the accident was the reckless conduct of the fleeing driver.

3. The second reversible error committed by the Court of Appeals was in considering the pursuit of Smith by the police as a proximate cause of the accident. To use the Court's own words, ". . . the excessive speed of the Smith vehicle could be said to have resulted from the fact that he was being pursued by the police . . ." Appendix A, *infra,* p. 24. The law of New York, as promulgated in *Stanton* and *Dunn* is that the proximate cause of the accident was not the pursuit by the police, but rather the reckless driving of the fleeing suspect. This rule was most clearly pronounced in *Thain* v. *City of New York,* 35 A. D. 2d 545 (2d Dept. 1970) at 546:

> A municipality is not to be held liable for the act of its police officers in undertaking a pursuit of a traffic violator. The police have a duty to undertake the pursuit. If the officers conduct the pursuit using their best judgment as to the most effective means of dealing with the violator, no liability will attach to their acts, even though hindsight might disclose alternate methods that may have been safer for the public bystanders (citing *Stanton*).

The New York rule is grounded in sound reason. The absurdity of the Court of Appeals' view is most poignantly expressed in *Wrubel, supra* at 880:

> Claimants' predication of liability on the State is founded on the novel position that the trooper, in attempting to halt one increasing the danger on the highway, did by his attempt alone increase the danger himself. To extend this position to the ultimate would require a police officer to pursue, at an otherwise lawful rate of speed, a lawbreaker traveling at an unlawful rate of speed, or to ignore him in the first place.

> An operator who is speeding, or who is a reckless driver on the highway, would know that all he had to do was to go faster—and under claimants' theory escape would be possible—there would be no chase. A burglar, bank robber or any other felon could threaten to shoot and under claimants' theory escape would be possible and arrest avoided. It is fantastic to further expand claimants' theory—such thinking would place a police officer in the same category as the Marquis of Queensbury in a pier six brawl.

4. In yet another respect the Second Circuit misconceived the New York law of proximate cause. It is clear that the only test applied by the Court was the *sine qua non,* or "but for" rule. While causation in fact is an indispensable part of proximate cause, this is at most a rule of exclusion, whereas proximate cause is a matter of policy in determining limits to the extent of liability in a given case. *Balfe* v. *Kramer,* 249 App. Div. 746 (2d Dept. 1936). See also Prosser, Law of Torts, chs. 7 and 9 (3d ed. 1964). Furthermore, the court erroneously held the issue of proximate cause to be one of fact properly decided by the jury. However, where as here, the essential facts are undisputed, the issue is one of law for the court. *Colban* v. *Petterson Lighterage & Towing Corp.,* 19 N. Y. 2d 794 (1967); *Tsitsera* v. *Hudson Transit Corp.,* 14 N. Y. 2d 855 (1964); *Rivera* v. *City of New York,* 11 N. Y. 2d 856 (1962).

The courts of New York have declared the law in such cases to be that the sole proximate cause of the accident was the reckless conduct of the fleeing driver, and that a municipality is not liable for the act of its police officers in undertaking the pursuit of a traffic violator. The Court of Appeals was bound by this law in this diversity case, and committed reversible error in not applying it.

5. The Court of Appeals and the District Court stripped the pursuing police of the protection granted them by sec-

tion 1104 of the New York Vehicle and Traffic Law. The standard of care mandated by paragraph (d) of that section by which the conduct of the pursuing police must be judged is "reckless disregard for the safety of others." With the exception of the single reference to the statute appearing at Appendix B, *infra*, p. 43, the entire charge of the trial judge was in terms of ordinary negligence. Although no specific exception was taken with respect to this aspect of the charge, it constituted error so fundamental and so prejudicial to the petitioner as to preserve it for review. *Dowell, Inc.* v. *Jowers*, 166 F. 2d 214, 221 (5th Cir.), cert. denied 334 U. S. 832 (1948); *Lo Cicero* v. *Columbia Gas Co.*, 268 F. 2d 440, 444 (5th Cir.), cert. denied 361 U. S. 917 (1959).

Likewise, the Court of Appeals appears to concede, "that the normal standards of negligence do not apply to a law enforcement officer operating under section 1104." Appendix A, *infra*, p. 22. Nevertheless, the court committed reversible error in two respects. In the first place it appears to have disregarded this higher standard of care in favor of one of ordinary negligence. That appears to be the standard applied throughout the rest of its opinion. In the second place, if the proper standard is something more than ordinary negligence, nowhere does the Court of Appeals say what this higher standard is.

It is clear that the proper standard to be applied is "recklessness". "The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind." Restatement (Second), Torts, sec. 500, comment g (1965). The term has a long history of interpretation in New York. It involves "indifference to the rights of others", "heedlessness", "indifference to consequences". *United Transportation Co.* v. *Hass*, 91 Misc. 311, affirmed 171 App. Div.

971, affirmed 222 N. Y. 623 (1918); *People* v. *Decina*, 2 N. Y. 2d 133 (1956); *People* v. *Eckert*, 2 N. Y. 2d 126 (1956); *Application of Martinis*, 20 A. D. 2d 79 (1st Dept. 1963); *Application of Kafka*, 272 App. Div. 364 (1st Dept. 1947). It imports "an utter heedlessness of care commensurate with the risk involved," *Mayer* v. *Temple Properties*, 307 N. Y. 559, 565 (1954). " 'Gross', 'culpable', 'criminal' and 'reckless' are the quivalent of each other in meaning and sense when applied to negligence." *Jenson* v. *Fletcher*, 277 App. Div. 454, 457, affirmed 303 N. Y. 639 (1951).

The principal ingredients in the definition of "recklessly" found in section 15.05, paragraph 3 of the New York Penal Law are disregard of a substantial and unjustifiable risk, and gross deviation from the standard of care that a reasonable person would observe. Furthermore, speed alone is not "recklessness". *People* v. *Grogan*, 260 N. Y. 138 (1932); *Fake* v. *MacDuff*, 281 App. Div. 630 (4th Dept. 1953); *People* v. *Bisig*, 46 Misc. 2d 299 (Spec. Sess. 1965).

At no time were any such definitions charged to the jury, and "[h]owever indefinite the rule, however uncertain the meaning of such words as 'gross', 'wanton', 'reckless', 'slight', yet in view of the facts of a particular case, both the rule and the words do convey an idea to the jury sufficient to guide their action." *People* v. *Angelo*, 246 N. Y. 451, 458 (1927). This prejudicial and reversible error was carried forward by the Court of Appeals in its failure to define the higher standard and in its apparent adoption of the lower standard. Correction of this error requires at the least a new trial on the issue of liability.

6. Special attention should be drawn to the fact that the higher standard of care, recklessness, should have been applied to all the pursuing policemen, including officer Fiore, who was operating the stationary patrol car. The Court of Appeals considered his conduct separately, and made no mention of recklessness with respect to him,

but only ordinary negligence. It is clear that he, too, was engaged in the pursuit of the stolen car and should have been given the protection of the statute. The error of the trial court, acquiesced in by the Court of Appeals, was compounded by its failure to charge paragraph (a) and subparagraph 1 of paragraph (b) of section 1104 of the Vehicle and Traffic Law. These make it clear that the statute applies to any driver of a police car, and includes the act of stopping, standing or parking. Also, section 113 of the Vehicle and Traffic Law defines "driver" as "Every person who drives or is in actual physical control of a vehicle." No distinction is made as to stationary or moving vehicles, and "stopping, standing or parking" is one of the activities that may be engaged in when in pursuit.

7. In judging the conduct of the pursuing policemen the Court of Appeals assumed that they did not know that the fleeing car was stolen until after the accident. The opinion states: "The after-acquired information that the pursued vehicle had been stolen does not excuse the negligence involved in the method of apprehending a person known only to have been involved in a minor traffic incident." Appendix A, *infra,* p. 23. This is a factual error. There was evidence at the trial, and the plaintiff's attorney conceded on the record, that at least at the last leg of the pursuit, before the collision occurred, the pursuing policemen knew that the fleeing car was stolen. Appendix B, *infra,* pp. 33-35.

In any event it was error for the Court of Appeals to consider the knowledge of the theft, or lack of it, in view of the express language of section 1104(a), which makes the statute applicable to even suspected violators of the law. It was certainly prejudicial error not to charge 1104(a) so that the jury could consider it in this connection. And the error was compounded by the failure of the trial judge to give a counter-balancing instruction to the jury that the policemen had a duty to pursue and apprehend

the violator. *Dunn* v. *State, supra; Thain* v. *City of New York, supra,* that flight is some evidence of guilt, *People* v. *Yazum,* 13 N. Y. 2d 302 (1963), and that the police have a great deal of discretion in determining what is suspicious, *People* v. *Rosemond,* 26 N. Y. 2d 836 (1970); *People* v. *Russo,* 38 Misc. 2d 957 (Crim. Ct. 1963).

The Court of Appeals apparently considered it important enough to mention twice in its opinion that when the police commenced their pursuit of Smith they only knew him to be a traffic violator. Appendix A, *infra,* p. 23. In addition to the fact that the statute affords protection to police pursuing even a suspected violator, there are other reasons why it was error for the court to consider the degree of seriousness of the violation known to the policemen in judging the reasonableness of their conduct. In the first place, there is no rule of law in New York requiring this. The court may have been confused with the rule that distinguishes between felonies and misdemeanors in judging the amount of force a policeman may exercise in effecting an arrest. Generally, a peace officer has the right to use only such force as is necessary to accomplish his purpose, and no more. However, in the case of a misdemeanor, there is the additional limitation that he has no right, except in self-defense, to shoot or kill the offender in attempting to arrest him; he is not justified in shooting him or killing him merely to stop his flight. Furthermore, a policeman is not justified in shooting to kill even a felon unless he knew the essential facts at the time he fired. See, generally, 4 Am. Jur. 54-57. However, these rules have no application to the instant case.

Secondly, whether or not the conduct of the pursuing policemen was justified with respect to Smith, does not determine whether they were reckless and breached their duty of care towards bystanders. The latter is an objective standard requiring that the officers be judged solely by their acts, and not by the state of their knowledge with

respect to Smith. Whether or not they knew the Smith car was stolen is irrelevant to the question of whether their conduct created a highly probable risk of harm to the decedent.

Additionally, while Smith was wanted for a mere traffic violation when the pursuit commenced, aside from the fact that the police learned during the chase and before the accident that the car was stolen, they were justified in suspecting the worst when he eluded three patrol cars at speeds of up to 100 miles per hour. This point was brought out in *Wrubel, supra,* at 878 and 879:

> Distilled to its essence, the case presents one question: Is the State liable for the damage occasioned by a fleeing lawbreaker while being pursued by a State trooper who was performing his duty?
>
> We do not believe so under the circumstances here. In the presence of a violation of law it is the officer's duty to take steps to suppress the offense and apprehend the offender. At its inception the offense being committed was only a traffic infraction. However, it developed, in the opinion of the court, into reckless driving, a misdemeanor, also into resisting an officer, and other crimes which could be made out of the incident as it developed.

Finally, it is naive to make a distinction between traffic violators and other offenders. On May 19, 1971 two patrolmen were seriously wounded by automatic weapon fire when they tried to stop a traffic violator in Manhattan. N. Y. Times, May 20, 1971, p. 1, col. 2; id., May 21, 1971, p. 26, col. 1. On May 20th a traffic violator in Brooklyn tried to shoot two policemen who stopped him in his car. N. Y. Times, May 22, 1971, p. 16, col. 5. On May 22nd in the Bronx a motorist attemtped to shoot two policemen who stopped him for passing a red light. N. Y. Times, May 23, 1971, p. 23, col. 5. These are only the three latest local incidents of attempts made on police-

men's lives by traffic violators reported in the newspapers while this petition is being prepared. I have no idea how many such incidents there are nationwide, and I can't even guess at how many more have gone unreported.

Whenever a policeman stops a car he can never be sure as to what awaits him. Whenever he attempts to apprehend a suspect, even a traffic violator, he takes his life in his hands. The risks he faces and the difficulties of his task are great enough without being unnecessarily increased, as they are by the decision in this case. By misapplying the law of the State of New York the Second Circuit has undermined the effectiveness of the police and correspondingly diluted the protection of the community at large.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SHERWIN REAR,
Counsel for Petitioner.

June 1, 1971.

APPENDIX A

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

34569, 34595

LETICIA E. MYERS, as Administratrix of the Goods, Chattels and Credits which were, of CHARLES E. MYERS, deceased,

Plaintiff-Appellant,

v.

TOWN OF HARRISON, et al.,

Defendants,

TOWN OF HARRISON,

Defendant-Appellant,

(and another case).

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Town of Harrison,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. JOSEPH SMITH,
J. Joseph Smith,

WILFRED FEINBERG,
Wilfred Feinberg,
Circuit Judges.

RICHARD H. LEVET,
Richard H. Levet,
District Judge.

March 5, 1971.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 101, 102—September Term, 1970.

(Argued November 9, 1970 Decided February 16, 1971.)

Docket Nos. 34569, 34595

LETITIA E. MYERS, as Administratrix of the Goods, Chattels and Credits which were of CHARLES E. MYERS, deceased,

Plaintiff-Appellee-Appellant,

v.

TOWN OF HARRISON,

Defendant-Appellant-Appellee,

and

THE CITY OF WHITE PLAINS, MVAIC, ORIENTA BUS LINE, INC., ARTHUR PELCHAT and WILLIAM SMITH,

Defendants.

Before:

SMITH and FEINBERG, *Circuit Judges,* and LEVET,* *District Judge.*

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* Senior United States District Judge for the Southern District of New York, sitting by designation.

Appeal from plaintiff's judgment in motor vehicle death action on trial to the jury in the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge*. Affirmed on the issue of liability, reversed for new trial on the issue of damages.

ALFRED S. JULIEN (Julien, Glaser, Blitz & Schlesinger, New York, N. Y., Morris Honig, of counsel), *for Plaintiff-Appellee-Appellant.*

BERNARD HELBENSTEIN, Brooklyn, New York, on the brief, *for Defendant-Appellant-Appellee.*

SMITH, *Circuit Judge:*

This is an appeal from a judgment in favor of plaintiff after a trial before Judge Motley in the United States District Court for the Southern District of New York and a jury in an automobile negligence case which resulted in the death of the appellee's husband. The jury awarded damages in the amount $481,250. The plaintiff has cross-appealed on the question of the proper rate of interest to be applied to the damage award. We find no error on the issue of liability. We find error in the charge on damages and reverse and remand for new trial on damages only.

At 1:35 a.m. on the morning of September 21, 1963, the appellee's intestate, Charles Myers, was proceeding in a northerly direction on North Street in White Plains, New York in a taxicab which he was operating. Myers came upon a police vehicle with its roof-light flashing operated by Patrolman Victor Fiore of the Harrison Police Department which was parked diagonally across part of North

Street, which at that point is a four-lane highway.[1] Myers brought his taxi to a stop near the police car and inquired as to what was occurring. Officer Fiore testified that he yelled at Myers to "Get the hell out of here" and then started to get out of the patrol car. As he did so, Fiore saw a car driven by one William Smith come over the top of a hill some 600 to 800 feet away at a very high rate of speed (90 miles per hour). Officer Fiore jumped to the side of the road as Smith's vehicle collided with the patrol car and the taxi. Smith was injured, and Myers was thrown out of his car and instantly killed.

The police pursuit which ended with the accident had begun in downtown Harrison when Officer Porto of the Harrison Police Department was told by an unidentified motorist that a black Pontiac had just backed into his parked car. Porto then pursued the Smith vehicle in order to ascertain whether it had been involved in the incident which had been reported to him. Porto turned on his lights and siren, but the Smith vehicle failed to stop. Porto pursued Smith through the Town of Harrison at speeds ranging up to 100 miles per hour, and he was soon joined by two other police vehicles in the chase. Their route took them through largely residential areas of the town over narrow, winding, and wet roads.

In the meantime, Fiore had been ordered to take up a position on North Street about one quarter of a mile from the place that the accident occurred. Instead of remaining there, however, Fiore on his own initiative moved further up North Street to a position near the entrance to St. Agnes Hospital at the bottom of a rather steep hill where a driver heading north would not be able to see Fiore's patrol car until he reached the top of the hill some 600 to 800 feet

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[1] The exact position of the police car prior to the accident is in dispute. The defendant-appellant contends that it was blocking only the two southbound lanes, while the appellee alleges that at least part of the vehicle was over the centerline and extending into the two northbound lanes.

away. There was expert testimony which is uncontradicted that a vehicle traveling at the rate of speed which Fiore knew the Smith car to be going could not possibly have stopped in less than 1750 feet.

The questions raised by the appellant are:

(1) Is there sufficient evidence to establish negligence on the part of the appellant as to the manner in which the pursuit was conducted?

(2) Is there sufficient evidence to establish negligence on the part of the appellant as to the way in which Fiore's vehicle was positioned on the highway?

(3) Were the negligent actions of appellant the proximate cause of the death of Myers?

(4) Was Myers guilty of contributory negligence?

(5) Was the amount of the damage award excessive?

Section 1104 of the New York Vehicle and Traffic Law provides:

(b) The driver of an authorized emergency vehicle may:

3. Exceed the maximum speed limits so long as he does not endanger life or property.

* * * * *

(d) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

L. 1959, C. 775, Eff. Oct. 1, 1960

The appellee argues that the weather and road conditions over the course of the route of pursuit and the excessive speeds involved, combined with the fact that, so far as the

Harrison Police knew, Smith had only been involved in a minor traffic incident, made the actions of the police unreasonable and showed a "lack of regard for the safety of all persons." [See, e.g. *LoCicero* v. *Columbia Gas Co.*, 268 F.2d 440 (5 Cir.), *cert. denied*, 361 U.S. 917 (1959).

The case of *Stanton* v. *New York*, 29 A.D.2d 612, *aff'd* 26 N.Y.2d 990 (1970) is relied upon heavily by appellant. There one Hayden, who was being pursued for a traffic violation by the state police, crossed the divider of an expressway and fled in a southbound direction in the northbound passing lane. The police officer also crossed into the northbound lane and chased Hayden at speeds up to 100 miles per hour. Hayden ended up colliding with a vehicle operated by plaintiff's intestate. The Court of Claims found no proof of negligence on the part of the state trooper in his conduct of the pursuit, and the Court of Appeals affirmed on the majority opinion of the Appellate Division. That court noted:

> The statutory requirement of section 1104 of the Vehicle and Traffic Law that the operator of an emergency vehicle should have "due regard for the safety of all persons" and the imposition of responsibility for "the consequences of his reckless disregard of the safety of others" are not such as to require compliance with the generally accepted definition of negligence. The immunity afforded the driver of an emergency vehicle from the regulations governing speed and direction of travel can only be denied when there is evidence of an exercise of these privileges in excess of reasonableness under the circumstances which the trial court did not find here.

While the Appellate Division thus made it clear that the normal standards of negligence do not apply to a law enforcement officer operating under section 1104, the court in *Stanton* was reviewing a non-jury trial in the Court of

Claims where the trial judge had decided as a question of fact that the pursuing trooper was not negligent or reckless. Here, on the other hand, the trier of fact has found such negligence on the part of appellant, and the only question before this court is whether there was sufficient evidence on this question to allow it to be submitted to the jury. Speeds of up to 100 miles per hour on wet and narrow roads, through a residential section, in pursuit of a traffic violator might well be said to create an unreasonable risk to public safety and there was expert testimony that pursuit in these circumstances does not constitute "common and accepted good police practices." The after-acquired information that the pursued vehicle had been stolen does not excuse the negligence involved in the method of apprehending a person known only to have been involved in a minor traffic incident. [N.B. *McCormick* v. *State*, 34 Misc.2d 806 (1962).]

Smith was also obviously guilty of negligent conduct, but this does not discharge the appellant's liability as a joint tortfeasor. The degree of culpability of each does not affect their respective responsibilities, for each is separately liable for the full extent of the damage caused. [*Pearson* v. *City of New York*, 142 N.Y.S.2d 14 (1955); *Mazloum* v. *New York, N. H. & H. R.R.*, 115 N.Y.S.2d 238 (1952).]

The next question is did the positioning of the patrol car by Officer Fiore at the bottom of a steep incline on North Street and Fiore's failure to take any precautions to warn approaching motorists constitute sufficient evidence of negligence to go to the jury. In *Commisso* v. *Meeker*, 202 N.Y.S.2d 287, 8 N.Y.2d 109 (1960), the defendant, sheriff, had parked his vehicle on the highway while giving a ticket to a speeding motorist. The plaintiff was involved in a head-on collision as he attempted to pass the obstructing vehicle. The New York Court of Appeals upheld a jury finding of negligence on the part of the sheriff noting:

> Certainly the jury had a right to find on the basis of the foregoing evidence that the Deputy Sheriff did

> not act reasonably under the circumstances and that he negligently obstructed the highway. Taking the view most favorable to the plaintiff, as we must do in the light of the verdict in her favor, it may be said that Zambon chose to obstruct the traveled part of the roadway on a night when traffic was exceptionally heavy, and failed to make full use of the 15 feet expanse of firm shoulder which was available to him. The jury also had a right to find on the facts when thus viewed that Zambon's negligence was a proximate cause of the accident and resulting plaintiff's injuries . . . together, of course, with the negligent acts of Mostrangelo and Meeker (the drivers of the two cars which collided). 202 N.Y.S.2d at 289-290. [See, e.g. *Thain* v. *City*, 313 N.Y.S.2d 484 (1970).]

In the present case, there was expert testimony that it was not proper or accepted police practice to position a patrol vehicle as was done here, and that in these circumstances the effect of the partial roadblock was to "endanger anybody in that vicinity." Fiore himself admitted that he took no other precautions. This would clearly appear to constitute sufficient evidence of negligence to allow the case to go to the jury.

Next, was there sufficient evidence to enable the jury to find that the actions of appellant were the proximate cause of the accident. There are here two lines of causation, both of which appear to have been sufficiently established. First, the excessive speed of the Smith vehicle could be said to have resulted from the fact that he was being pursued by the police, and it was rather clearly this high rate of speed which caused him to lose control of the car. Second, the position of the Fiore car, whether or not it completely blocked the entire roadway, could be said to have caused Smith to swerve or attempt to stop which in turn resulted in his losing control and thus the accident.

The appellant contends that Myers was guilty of contribuotry negligence in stopping his taxi next to the patrol

car and in failing to move when warned by Fiore, and further, that the trial court's instructions on the issue of contributory negligence were inadequate. The jury apparently found that it was reasonable for Myers to stop his taxi when confronted with a police car with its light flashing, parked across the road, and that the warning by Officer Fiore was either not given on inadequate. There would seem to be no grounds which would justify a reversal on this point.

Judge Motley instructed the jury on the issue of contributory negligence as follows:

> . . . Now on the issue of contributory negligence, the burden is, as I have told you, on the defendant. The defendant must show that the plaintiff's deceased husband was guilty of negligence proximately contributing to his own death.
>
> If on the evidence as a whole, including any evidence introduced by plaintiff, you conclude that it is more probable that plaintiff's deceased husband was guilty of negligence proximately contributing to his own death, your verdict will be for the Town.
>
> If, however, you cannot so conclude or you find that the evidence was so evenly balanced on that issue that you are unable to say that the greater weight of the evidence is on either side, your finding will be for the plaintiff (Appendix, p. 457).

This charge is fully adequate as to contributory negligence, and, in any event, the appellant voiced no exceptions to the charge at the time it was given to the jury.

The final point raised by appellant is that the amount of the damage award was excessive. For some years, it has been the law in this circuit that federal appellate courts have the power to reduce the amount of damages awarded by a jury. *Dagnello* v. *Long Island Ry.*, 289 F.2d 797 (2d Cir. 1961); *Moore-McCormack* v. *Richardson*, 295 F.2d 583, 587 (2d Cir. 1961), *cert. denied*, 368 U.S. 989 (1962).

It is also well settled, however, that where the trial judge has approved a verdict, the fact that the appellate court were it sitting as triers of fact might have allowed a different amount does not justify its interference. [*Whitaker* v. *Bladberg, Rothchild Co.*, 296 F.2d 554 (4 Cir. 1961); cf. *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (2d Cir.), *cert. denied*, 382 U.S. 983 (1964). As the Supreme Court noted in *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946):

> Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel another conclusion is more reasonable.

At the time of the accident Myers was earning $6,550 per year at Union Carbide, plus approximately $3,600 from driving the taxi and $400 per year from the Naval Reserve, or approximately $10,500 per year. There is evidence that by the time of the trial, Myers would have been earning $11,500 at Union Carbide or a total income (assuming he kept his taxi job) of approximately $15,000. Myers' life expectancy was forty-one years, and he left three young children. Since at the time Myers was studying for further technical degrees in his field, it is reasonable to expect that he would move up with the company, although any estimate of his expected lifetime earnings is obviously highly speculative.

There is case law in New York which allows in awards of this type that the jury include in its calculations the income producing capacity of the principal amount, the present value of future earnings, and to discount the total

amount of the award because of the speculative and highly contingent nature of future earning capacity many years hence. [*Zaninovich* v. *American Airlines*, 271 N.Y.S.2d 866 (1966); *Grayson* v. *Irvmar Realty Co.*, 184 N.Y.S.2d 33, 37 (1959).] In *Zaninovich* (*supra*) the decedent was appoximately the same age as Myers, left four young children, and was also earning about $15,000 per year at the time of the award. The court estimated his probable maximum earning to be $30,000 to $35,000 per year which level he would reach at about age 35. The income produced from the investment of the award there was $30,000. The court found the amount of the award excessive noting:

> The gross amount of $750,000 would yield at a 4% return $30,000 per year for these four children, and still leave the capital unimpaired at their majority. This is far above the style of living to which they were accustomed while supported by a father earning under $15,000 per year, subject to taxes and his expenses of earning a living or that they would attain for quite some years even under the most promising of circumstances.
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> 271 N.Y.S.2d at 877.

There was relatively little testimony presented as to the question of damages. The only witnesses were a fellow employee of the decedent and the appellee herself. While it is true that the appellant made no request for a charge in reference to a possible discount or for the jury to consider in its computation a deduction for the decedent's expenses had he lived, it is also true that the trial court failed to call either of these facts to the attention of the jury. In its charge the court merely referred to "loss of financial support which decedent made and would have continued to make during his lifetime." The court set forth some elaboration as to "other factors" by mentioning the "loss of decedent's services to his wife and around

the house"; "loss of decedent's contribution for example, to the plaintiff for psychiatric care." But whether this was intended to relate to the decedent's personal administrations or his payment for psychiatric treatment is unclear. There was little, if any, proof of personal psychiatric aid by the husband, and payments to psychiatrists would be provided for in the appellee's loss of her husband's income. In addition, in its charge as to loss of earnings the court mentioned life expectancy without distinguishing this from work expectancy.[2]

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[2] The complete charge on damages follows:

"Incidentally, the fact that I instruct you on the issue of damages does not mean that you are to assume that the Court is of the view that the plaintiff is entitled to a verdict or indeed as to how you should decide the case. That is, as I have already told you exclusively your function. The purpose of the law is to award, as far as possible, just and fair compensation for the loss which directly flowed from the wrong done to the plaintiff. The damages awarded must be purely compensatory and reasonable, neither inadequate nor excessive. The matter rests in your sound discretion. You will be guided again by your common sense and experience. Your award must bear a reasonable relationship to the damages suffered.

In assessing damages your aim should not be to make the plaintiff a rich woman at the expense of the defendant Town of Harrison. Personal feelings or sympathy or bias should not enter into your consideration. Your aim should be to award plaintiff a sum of money which would be fair and reasonable compensation to her for injuries she has received as the result of the death of her husband.

The plaintiff is entitled to damages only for those injuries and losses which are attributable to or which was proximately caused by defendant's negligence.

Plaintiff, if she has sustained her burden of proof is entitled to compensation as follows:

Hospital and funeral expenses, loss of financial support which decedent made and would have continued to make during his lifetime; loss of decedent's services to his wife and around the house; loss of decedent's contribution, for example, to the plaintiff for psychiatric care. At the time of the accident the plaintiff claims that her husband was earning approximately $10,000 a year. According to the life expectancy tables of a

(*footnote continued on following page*)

This court noted in *McWeeney* v. *New York, N. H. & H. R.R.*, 282 F.2d 34, 40 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960):

> The purpose of damages is to compensate the plaintiff for losses which he has suffered to the time of the trial and may reasonably be expected to suffer in the future. The plaintiff is entitled to have the jury instructed as to every item of the loss, which includes reasonable medical expenses, loss of earnings past and future, and pain and suffering, past and future. On the other hand, the defendant who must pay the damages, is entitled to have the jury instructed in such wise that it will make its calculations in the light of a proper understanding of what the plaintiff should receive in order to make him whole. The plaintiff should receive no more than that at the plaintiff's expense. The defendant is entitled to a charge which will direct the jury's attention to every item and consideration which may substantially reduce the plaintiff's loss so that the jury does not charge the defendant with a loss which the plaintiff would never have to suffer. Even handed justice requires nothing less than this.

The amount of the damages award here was obviously quite substantial. Yet, unfortunately, the record as indicated above, gives little clear indication of how the verdict was computed or what elements were considered and how much was allowed for each. No special interrogatories, however desirable in such a case, were propounded.

(*footnote continued from previous page*)

government agency, decedent had a life expectancy of 41 years. In awarding damages in this case, you may take this fact into consideration.

Plaintiff is also entitled to recover for loss of care, advice, nurture, religious guidance and companionship which her deceased husband gave to her, and to each of her three children." Appendix, pp. 470-472.

Consequently, while we intimate no views as to whether in fact the amount of the award was excessive, we are of the opinion that the record in its present state fails to provide a sufficient basis as to the method of its computation to allow us to make such a determination. Therefore, while upholding the court below as to the finding of liability, we reverse its conclusions as to the amount of damages and remand for a new trial on this issue.[3]

Finally we come to the question on the cross-appeal as to the maximum allowable interest under the New York General Municipal Law, Section 3(a). At the time of the accident the maximum allowable interest rate was set at 4%. In 1969 this was raised to 6% (effective February 25, 1969). The question is whether the 6% rate will be applied retroactively from the date of the accident until February, 1969. Judge Motley held that appellee would be allowed only 4% interest up until the date of the statutory change relying on the authority of *People ex rel. Emigrant Industrial Bank* v. *Sexton,* 284 N. Y. 57 (1940), a certiorari proceeding to reduce a tax assessment on real property and for refund of excess taxes with interest. There the New York Court of Appeals held that the rate prevailing on the date of the payment of the tax was applicable. There is, however, earlier authority from the Court of Appeals that the statutory interest in effect at the time of the entry of the judgment will be applied retroactively to the time of the accident in wrongful death actions. In *Salter* v. *Utica and Black River Railroad Company,* 86 N. Y. 401 (1873), the court held:

> We think that under this statute the rate of interest is governed by the statute regulating interest, in force when the damages are ascertained by verdict. The right to interest then accrues, and relates back to the

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[3] We would suggest to the court below that on remand the jury be given specific instructions as to the deduction of the expenses of the decedent from the total award (*Meehan* v. *Central Railroad Co.,* 181 F. Supp. 594, 619 (S.D.N.Y. 1960).

> time of the death. But the rate of interest on the damages, liability for which is then first established, and the amount of which is until that time uncertain and unliquidated, is the rate which the statute then prescribes. 86 N. Y. at 402.

The court in *Emigrant* (*supra*) specifically distinguished *Salter* with no suggestion that its holding is no longer applicable:

> In the *Salter* case the court had before it the question of the rate of interest to be allowed on damages for wrongful death when the legal rate had been changed from seven per cent to six per cent between the time of the death and the entry of judgment. The court held that the six per cent rate applied for the whole period. While this holding indicates that under some circumstances interest statutes may be applied retroactively, we find no warrant for such a result in this case.

[See, e.g., *Toomey* v. *New York City Transit Authority*, 199 N.Y.S.2d 281, *aff'd* 204 N.Y.S.2d 348 (1960).]

Admittedly the state of the law in New York on this point is somewhat unclear. Hopefully the state courts will have occasion to re-examine the question prior to the entry of final judgment in the present case. As of the moment, however, we are of the view that the rationale set forth in *Salter* is controlling.

Affirmed as to liability. Reversed and remanded for new trial on the issue of damages only. Retrial on damages should be scheduled as promptly as feasible.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

64 Civil 302 JUDGMENT #70,466

LETITIA E. MYERS, as Administratrix of the goods, chattels and credits which were of CHARLES E. MYERS, deceased,

Plaintiff,

against

TOWN OF HARRISON, CITY OF WHITE PLAINS, MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION, ORIENTA BUS LINES, INC., ARTHUR PELCHAT and WILLIAM SMITH,

Defendants.

The parties having stipulated that the action as to the defendant Arthur Pelchat be discontinued, and the issues as between plaintiff and the defendant Town of Harrison having come on regularly for trial before the Honorable Constance Baker Motley, United States District Judge and a jury, on December 16, 17, 18 and 19, 1969, and the jury having returned a verdict in favor of the plaintiff as against the defendant Town of Harrison, and the jury having awarded damages in the amount of $481,250, and the Court having granted interest on the said amount @ 4% from September 21, 1963 to July 25, 1969 and @ 6% from July 26, 1969 to January 15, 1970, in the amount of $13,631.09, for a total award of $607,440.18, and it is further,

ORDERED: That the action as to the defendant Arthur Pelchat be and it is hereby discontinued.

Dated: New York, N. Y., January 16, 1970.

APPROVED:

CONSTANCE BAKER MOTLEY,
U.S.D.J.

JOHN LIVINGSTON,
Clerk.

* * * *

information as to the stolen car?

The Court: Oh, yes, when did he first learn that the car was stolen.

Mr. Julien: When the White Plains police learned about it, if your Honor pleases, has nothing to do with the Harrison police. Fiore has already testified in his examination he didn't even know it was a stolen car.

The Court: He has previously.

Mr. Julien: Yes, the part I read. All he knows is that it is a hit and run car. That is all Fiore knew. Now when White Plains police knew makes no difference. They are not involved in this at all. They didn't apprehend this car. This is just an attempt, your Honor, I respectfully say, to get before the jury the kind of prejudicial information which makes it sound as though there is a great hero image here to be surrounding the Harrison police. Because actually here is what happened. In the first place when the entire chase started there is nothing about a stolen car, that the last minute they hear it is a stolen car, but Fiore doesn't even know it.

The Court: All right, I forgot that the White Plains police didn't even know that the car was stolen.

Mr. Julien: The White Plains police knew. The Harrison police didn't know until the last instant.

The Court: You are confusing me now. When did the White Plains police learn that the car was stolen? Was that before the accident?

Mr. Julien: The White Plains police had information that a car had been stolen before the accident, yes.

The Court: But the Harrison police did not?

Mr. Julien: The Harrison police did not. The Harrison police learned that the car which they had already been chasing for some four miles is a stolen car, from the White Plains police.

The Court: When they got there, to the accident?

Mr. Julien: Well, that is what we think, but I have to be frank to say one of the depositions indicates they may have heard it in the course of the last leg of the pursuit.

Mr. Levy: That was it. This was the fact.

Mr. Julien: But Fiore testifies he doesn't know this at all. Fiore says it is just a hit and run driver, that is all he knows he is obstructing in the roadway.

The Court: And you want to show what?

Mr. Levy: There is no such evidence by Fiore.

Mr. Julien: I just read it.

Mr. Levy: You are characterizing the evidence and that is beside the point. I want to show the knowledge by both police departments of the time of their knowledge when the car was stolen.

Mr. Julien: I submit that the knowledge of the White Plains police until it communicated to the Harrison police is of no moment.

The Court: Yes, I agree with that.

Mr. Julien: Secondly, he is doing much more than that. He is attempting to show that some White Plains policeman and Mr. Pelchat, the owner of the car, were riding around the town of White Plains looking for the car at that time. This I submit is wholly immaterial to the happening of this occurrence. What difference does it make if they were riding there, riding in New York or anywhere? What does it have to do with this case? We have freely admitted it was a stolen car, we said it right from the start, that is out of this. There is no problem with respect to proof. But what is being attempted here is to attempt to show—

The Court: Yes, I understand you. Put that on record.

Mr. Levy: Let's not belabor this. You said this three times.

The Court: Just a moment. Is there some evidence that the Harrison police learned before the accident that the car was stolen?

Mr. Levy: Of course.

The Court: Just a minute. And communicated that to the Harrison police before the accident? Is there some—

Mr. Levy: I don't follow you. You said Harrison police twice.

The Court: Do you want to read it back?

(Record read.)

The Court: You are right, I made an error.

The question is, is there any evidence that you know of that the White Plains police, before the accident, learned that the car was stolen and communicated that fact to the Harrison police?

Mr. Julien: Yes, at the last leg of the pursuit, when the pursuit was perhaps four miles under way the Harrison police learned from the White Plains police that they are pursuing a stolen car, yes, but Fiore doesn't know that, but that is a fact.

The Court: Who is Fiore?

Mr. Julien: He is the man that put the road block in.

Mr. Levy: You are so zealous on this, you missed the point.

Mr. Julien: You bet I am zealous, but that has nothing to do with this discussion.

* * * *

AFTERNOON SESSION

1:30 P.M.

(In open court; jury present.)

CHARGE OF THE COURT

(Motley, D.J.)

Ladies and gentlemen, first of all I want to thank you for your patience throughout this trial and for the careful attention which you have given to the testimony and the evidence as it came in.

I know that all of you had to make personal sacrifices in order to serve on this jury, but I would like to remind you that we all have a stake in the fair and impartial administration of justice so that if any of you did have to make personal sacrifiecs in order to serve here, I am sure that you were glad to do so.

I also would like to thank counsel on both sides for their patience with the Court and to congratulate them upon their high degree of professional skill which each has demonstrated throughout this trial.

Now, ladies and gentlemen, we have come to that part of the trial where you are to perform your function and your function is in three parts.

First, you are to decide the fact issues in this case.

Secondly, you are to apply the facts as you find them to the law as I give it to you in this charge.

And thirdly, you are to render a fair and impartial verdict in this case either for the plaintiff or for the defendant.

We are now ready to have you perform your function because all of the evidence is now in.

You have heard all of the witnesses on both sides and all of the exhibits which were offered in evidence are now before you as well as any stipulations which the parties entered into in this case.

It is from the testimony of the witnesses which you heard from the witness stand, and exhibits received in evidence, and the stipulations from which you are to decide the disputed issues in this case, and from nothing else.

As I have told you before, anything which the lawyers might have said in their opening statements or during the course of this trial or in their closing statements which you heard this morning is not evidence.

The same is true with respect to anything which I might have said or any question which I might have asked during the course of trial. This is not evidence either.

If during the course of the trial I sustained an objection to any question you are to disregard the question.

If I sustained the objection to any question and answer thereto, you are to disregard both the question and the answer.

If during the closing arguments of the lawyers they made some statement which you feel is not in accordance with the facts, I remind you again it is your recollection of the facts which governs in this case, and not that which the lawyer or the Judge recalls.

So I want to point out to you that if during the course of this charge, as I make reference to the facts, if I misstate some fact which does not accord with your recollection it is your recollection which governs.

Incidentally, also, when I refer to the facts during the course of this trial and the contentions of the parties, I am not intending to give you my personal view of what the evidence proves or to indicate to you that I favor one side or the other.

In a Federal Court a Judge may comment upon the evidence, but I am not going to do so. I am going to leave it entirely up to you to decide the disputed issues of fact in this case.

I also want to point out that in referring to the facts I don't intend to go over all of the facts in the case. I only refer to certain facts in stating the propositions of law to you.

Another thing I want to caution you about is that you are not to consider one instruction as stating the law in this case but you are to consider the instructions as a whole.

Moreover, you are not to be concerned about the wisdom of any rule of law. You must disregard any opinion which you might have as to what the law ought to be. It would be a violation of your sworn duty to base a verdict on any other view of the law than that which I give you in this charge.

I think it desirable at the outset to emphasize the fact that there was a fatal automobile accident resulting in the

death of the plaintiff's husband does not in itself mean that the plaintiff is entitled to recover in this action against this defendant, the Town of Harrison.

In order to recover in a civil action of this kind the plaintiff must sustain what we call in law the burden of proof. In other words, plaintiff must prove that there was negligence on the part of this defendant, which was a proximate cause of her husband's death, and she must prove that by a fair preponderance of the evidence.

Now, in substance the plaintiff claims that as a direct consequence of the negligence of police officers of the Town of Harrison, without any negligence on the part of her deceased husband, her husband was killed and that she and her minor children have suffered personal losses and damages which resulted directly from the death of her husband.

More specifically, plaintiff claims that in trying to apprehend the driver of a fleeing car the police officers were negligent in several respects. They were negligent, she says, in the beginning and in continuing their chase of the blue Pontiac automobile at increasingly high rates of speed through a residential area on a rainy night over hilly and winding road.

She also claims that police officer Fiore was negligent in placing his car across the road to create a road block for the fleeing car, and in failing to wave her husband on when he came upon the scene.

Defendant, the Town of Harrison, which is here sued for the alleged negligence of its police officers, denies any negligence on its part, that is on the part of the police officers, and alleges that any injury to the deceased at the time and place in question was caused by the driver of the fleeing car, and by the decedent's own negligence.

If you should find that plaintiff has sustained her burden of proving by a fair preponderance of the evidence that the police officers were negligent in any respect claimed, then you must find that the defendant, Town of Harrison, was

negligent for the Town is responsible for the negligent acts of its police officers, either of commission or omission while those police officers are in performance of their official duties.

There is no more important issue of law involved here than that concerning negligence.

What does the law mean by negligence? As I have already pointed out the mere fact that some accident happened does not support an inference of negligence. Negligence means the lack of due care under the circumstances. Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances or doing what such a person under the existing circumstances would not have done.

You will note particularly that in testing the degree of care imposed by law on the defendant, we mean the degree of care that ordinary prudent persons in like circumstances would exercise except as specifically noted in this charge with respect to the standard applicable to police officers in pursuit of a fleeing car. Within the ordinary standard of care, however, the amount of care demanded may vary with the circumstances.

The burden of proving negligence on the part of the Town of Harrison and the burden of proving that such negligence was a proximate cause of the death of plaintiff's husband is in this case, as I have said, upon the plaintiff. The burden of proving that plaintiff's deceased husband was guilty of negligence which proximately contributed to his own death is on the Town.

The burden of proof on a particular issue means that after considering all the evidence in the case the contention of that party on that issue must be established by a fair preponderance of the credible evidence. The credible evidence means stipulations which the parties brought before you, the testimony of the witnesses, and the exhibits which you find worthy of belief. A fair preponderance of the evidence means the greater weight of the evidence. That

does not mean the greater number of witnesses or the greater length of time taken by either side.

The phrase refers to the quality of the evidence, the weight and the effect which that evidence has upon your minds.

The law requires that in order for a party to prevail on an issue on which that party has the burden of proof, the evidence that supports that party's claim on that issue must appeal to you as more nearly representing what took place than that opposed to that particular claim.

If it does not or if it weighs so evenly that you are unable to say that there is a preponderance on either side, you must resolve the question against the party who has the burden of proof and in favor of the opposing party on that particular issue.

Now in a death action such as we have here, however, the plaintiff is not held to as high a degree of proof as an injured plaintiff who can himself describe the occurrence. Moreover, the plaintiff need not present direct evidence of her cause of action. It is sufficient if she presents facts and circumstances in which negligence of the defendant in the course of the accident by that negligence may be reasonably inferred.

In this connection plaintiff is not required to offer evidence which positively excludes every possible cause of the accident except defendant's negligence.

If from the evidence as a whole, including any evidence introduced by defendant, you conclude that it is more probably that the police officers were guilty of negligence proximately causing the collision than that they were, your finding on the issue of negligence will be for the plaintiff.

If, however, you can not so conclude or you find that the evidence is so evenly balanced that you are unable to say that the greater weight of evidence is on either side of this issue, your verdict must be for the defendant.

Now on the issue of contributory negligence, the burden is, as I have told you, on the defendant. The defendant

must show that the plaintiff's deceased husband was guilty of negligence proximately contributing to his own death.

If on the evidence as a whole, including any evidence introduced by plaintiff, you conclude that it is more probable that plaintiff's deceased husband was guilty of negligence proximately contributing to his death, your verdict will be for the Town.

If, however, you can not so conclude or you find that the evidence was so evenly balanced on that issue that you are unable to say that the greater weight of the evidence is on either side, your finding on the issue will be for the plaintiff.

If you find that the police officers were negligent, either in commencing or continuing the chase under all the circumstances or in putting up the road block, then before you can find for the plaintiff you must also find that the negligent police action was what we call a proximate cause of the fatality.

In cases where the actions of more than one person are involved in the injury or the death of another, the question of proximate cause is a difficult one. In cases involving the actions of police officers in attempting to apprehend a fleeing car and the fleeing car hits another car or injures an innocent person, we have a typical situation in which the determination of proximate cause is a difficult one.

Now the question is what is proximate cause? Proximate cause is that cause which in a natural and continuous sequence, unbroken by any intervening cause, results in the accident and the consequent injury and without which the accident and injury could not have occurred.

Bear in mind that the plaintiff must establish the existence of proximate cause, also by a fair preponderance of the evidence. If you should find that even though the police officers were negligent, their negligence was not a proximate cause of the accident, then that would be the end of the case and you must bring in a verdict for the defendant.

The defendant, Town of Harrison, can not be held responsible for any action or conduct of the driver of the

pursued vehicle in his flight to avoid prosecution. However, there may be more than one proximate cause of an accident. Where two parties by their separate and independent acts of negligence furnish direct causes of a single injury to another person and it is not possible to determine in what proportion each contributed to the injury, either is responsible for the whole injury even though his act alone might not have caused the entire injury.

Where there is negligence on the part of a defendant and harmful consequences are brought about by some intervening or independent force, the operation of which might have been reasonably foreseen, then there is no break in the chain of causation of such character as to relieve a negligent defendant of his liability.

In other words, if you find that Patrolman Fiore was negligent, but that the accident resulted when the fleeing car came upon the scene at the very time when plaintiff's deceased husband happened upon the highway in the vicinity of Fiore's parked car, and that the appearance of the fleeing car on the scene at that time was a reasonable foreseeable event on Fiore's part, then you may still find the defendant here negligent.

It is not defense that some negligent act of another may have concurred to produce the result.

Also, it is not necessary that Fiore should have foreseen the particular method by which the accident would occur if the possibility of an accident was clear to the ordinarily prudent eye.

In this case, if you find that the police officer commencement and/or continuation of the chase under all the circumstances was negligent or that the setting up of the road block as described by the testimony over the crest of a hill was negligence, or that both were negligent, and that such negligence in a natural and continuous sequence unbroken by any efficient intervening cause resulted in the accident in death of plaintiff's husband, without such negligence the accident and death would not have occurred, then you

may find that such negligence was a proximate cause of the accident and death of plaintiff's husband.

On the other hand, if you find that plaintiff has not established by a fair preponderance of the evidence that the conduct of the police officers was a proximate cause of the fatal accident, then you must find for the defendant.

In looking at the police conduct in respect to the pursuit of the fleeing car, you must consider that what is negligence for an ordinary driver may not be negligence for a patrolman engaged in such pursuit. For instance, a police officer is permitted to chase a lawbreaker at a rate of speed in excess of the speed limit. On the other hand, an ordinary driver who exceeds the speed limit is considered negligent. The police officer, however, is not free to chase law violators in any manner. The applicable statute of the State of New York relating to the police driver's conduct that existed at the time of the accident states:

"The driver of an authorized vehicle may exceed the speed limits so long as he does not endanger life or property."

The statute further explains the driver's responsibility, that he is the police driver. It says, "The foregoing provision"—which I just read to you—"shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others."

Now this means that the privilege of exceeding the maximum speed limit is permitted only so long as it does not endanger life or property. The responsibility imposed on police officers by the statute to drive with due care for the safety of others does not cover compliance with the generally accepted definition of negligence, as I told you earlier.

But the question you must decide, like the police officer's conduct with respect to the road block is whether the Harrison police followed proper police procedures in chasing

the fleeing car. In deciding whether the Harrison police, in pursuing that particular driver, failed to drive with due regard for the safety of all persons you may consider the testimony of plaintiff's expert witness, Mr. Hammer. He testified that at some point of time before the accident the police officers should have recognized that continued pursuit was hazardous, in other words, it was improper police procedure for the police to chase a traffic violator at high speeds under drizzly weather conditions using wet, hilly and curvy roads in a residential area, and at night.

If you believe this witness or find from testimony independent of this witness that the police conduct in light of all the circumstances unreasonably endangered life or property, than you must find that the police officers were negligent with respect to the chase.

On the other hand, if you disbelieve the plaintiff's expert witness and find that the policeman's pursuit was reasonable under all the circumstances, that is the weather conditions, engineering of the road, the seriousness of the Pontiac driver's offense as known to the police at the time of the chase, and the amount of traffic on the highway, then you must find that the Harrison police officers' conduct was proper.

In determining whether Patrolman Fiore was negligent when he set up the road block, you must consider all of the circumstances. The questions that you may ask yourselves in determining whether Fiore's placement of his car in the road was negligence, are:

Was it proper for Patrolman Fiore to put his car near the center line at a slight angle or crosswise on the highway?

And was it proper to place it in front of or near to St. Agnes Hospital?

Was it proper to place it 700 feet from the crest of the hill?

Was there sufficient warning to oncoming cars from the position in which Patrolman Fiore placed his car?

You may also take into consideration the length of time between the time Fiore was notified of the fleeing car and the accident. You may also consider what training Patrolman Fiore had for the apprehension of fleeing cars. The failure of the defendant Town of Harrison to use reasonable care in training its police in this area may be considered by you in determining whether the Harrison police were negligent.

Finally, you may consider the wet road conditions, the amount of visibility, the traffic conditions, the time of night, and again the testimony of the expert witness, Mr. Hammer, on the subject of road blocks.

Plaintiff claims that Patrolman Fiore was negligent in failing to wave her husband off the road. In this connection you may also consider omitted acts of Patrolman Fiore. For example, you may consider that Patrolman Fiore had a flashlight and flares which he failed to utilize.

If you find from all the evidence in the case that Patrolman Fiore was negligent in placing his car as he did, under all the circumstances, then you must find that the defendant was negligent.

If you find from a preponderance of the evidence that the police officers were negligent and their negligence was a proximate cause of the death of plaintiff's husband, then you must proceed to the question whether the deceased husband himself was contributorily negligent.

What does the law mean by contributory negligence? Contributory negligence is fault on the part of the person injured which, cooperating in some degree with the negligence of another, is the proximate cause in bringing about the injury. In determining the negligence of the decedent you apply the same yardstick used in measuring the defendant's negligence, that is the failure to exercise due care, to do what a reaosnably prudent person would have done under the circumstances or doing what a reasonable person would not have done under the circumstances.

Bear in mind that the defendant has the burden of prov-

ing that the plaintiff's husband was contributorily negligent.

Before you may find that the defendant has met its burden of proving contributory negligence, you must find from a fair preponderance of the evidence that the decedent was negligent and that his negligence was a proximate cause of his death.

Fiore testified that when plaintiff's husband came upon the scene he yelled to him to move on, but for some unknown reason the plaintiff's husband did not move. Of course, plaintiff's husband is not here to tell us his side of the story, but you must bear in mind that although Fiore's testimony is uncontradicted, you are not required to accept it. Fiore is an interested witness and you should consider his testimony in the light of all the other facts and circumstances in this case.

If you find that decedent was contributorily negligent then you must find for the defendant. If you find that plaintiff's deceased husband disregarded a clear instruction from Patrolman Fiore to move on, and that this disregard of an officer's clear instruction proximately contributed to the accident, then you must find for the defendant. If you find that Patrolman Fiore did not give a clear instruction to plaintiff's deceased husband or that such instruction was not given in time to be obeyed, then you must find the plaintiff's deceased husband was not contributorily negligent.

Now, ladies and gentlemen, it is also your duty to determine the credibility of the witnesses and the weight that their testimony deserves.

You have heard the testimony and the question is how do you determine the weight to be given to the testimony of the various witnesses. How do you determine if they are credible?

In your search for the truth you use your common sense. That is why you are here. We hope that you are average men and women, and we want you to bring to this case

your daily experiences in life and your common sense so that you can make an adjudication as to who is telling the truth and who is not. You are not expected to leave your common sense at the door of a courtroom when you come in here to sit as a jury in a case.

There is no mystery about your actions and there is no mystery about your services. You are supposed to bring to this case your daily experiences in life and to base an adjudication upon the evidence in the case, but at the same time I emphasize again using your common sense.

You have seen the witnesses on the stand. You have observed their demeanor. How did they impress you? Did they appear to be testifying frankly? Candidly? Fairly? In other words, in evaluating the testimony and the credibility of witnesses you apply your common sense and experiences precisely as you do in determining an important matter or affair in your own life when you have to decide whether to believe someone or not.

You should consider, and I assume you naturally will, the witness's demeanor, his background, his candor, his lack of candor, possible bias, means of information, accuracy of recollection, and you should consider whether the witness's testimony is supported or whether it is contradicted by credible evidence and circumstances. You should particularly consider whether a witness has an interest in the case and this goes for both sides: When a witness has an interest in a case there is a temptation to color or exaggerate testimony or possibly even to withhold damaging testimony.

You should weigh all of these factors throughout your deliberations and I merely say that interest is an element to be considered in determining the credibility of the witnesses and the weight of the evidence.

If you find that any witness has made a material misstatement with the intention of misleading you, you may disregard that portion of the witness's testimony. You may disregard all of it if you do not believe it as a result

of that misstatement or, ladies and gentlemen, you may accept that part which you find reliable and disregard the rest of it.

You may also consider the strength or weakness of a witness's recollection, but sometimes while a witness may not be intending to deceive, he may have a weak recollection on the subject or be incapable of accurately setting forth what he observed or did, or even without realizing it he may not have been aware of the actual facts as they occurred and you may consider that in judging the credibility of a witness.

Now I want to say just a word about expert witnesses. You will recall that plaintiff did call an expert witness in this case, Mr. Hammer. The expert witness gave testimony concerning his qualifications as an expert in his field. Now when a case involves a matter of science or art or some field requiring special knowledge or skill not ordinarily had by the average person, an expert is permitted to state his opinion for the information of the Court and jury.

The opinion stated by the expert who testified before you was based upon particular facts as the expert himself observed them, and testified to them before you, or as the attorney who questioned him asked him to assume.

You may reject an expert's opinion if you find the facts to be different from those which form the basis for his opinion. You may also reject his opinion if after careful consideration of all the evidence in the case, expert and otherwise, you disagree with that opinion.

In other words, you are not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony. Such an opinion is subject to the same rules concerning reliability and credibility as the testimony of any other witness. It is given to assist you in reaching a proper conclusion and it is entitled to such weight as you find the expert's qualifications warrant and must be considered by you, but it is not controlling upon your judgment.

If on all the evidence you find that the plaintiff has sustained the burden of proof, that the defendant was negligent and that that negligence was a proximate cause of the death of her husband, then, and only then, do you reach the question of damages. Of course if plaintiff has failed that would end the case. You do not consider damages at all.

Incidentally, the fact that I instruct you on the issue of damages does not mean that you are to assume that the Court is of the view that the plaintiff is entitled to a verdict or indeed as to how you should decide the case. That is, as I have already told you exclusively your function. The purpose of the law is to award, as far as possible, just and fair compensation for the loss which directly flowed from the wrong done to the plaintiff. The damages awarded must be purely compensatory and reasonable, neither inadequate nor excessive. The matter rests in your sound discretion. You will be guided again by your common sense and experience. Your award must bear a reasonable relationship to the damages suffered.

In assessing damages your aim should not be to make the plaintiff a rich woman at the expense of the defendant Town of Harrison. Personal feelings or sympathy or bias should not enter into your consideration. Your aim should be to award plaintiff a sum of money which would be fair and reasonable compensation to her for injuries she has received as the result of the death of her husband.

The plaintiff is entitled to damages only for those injuries and losses which are attributable to or which was proximately caused by defendant's negligence.

Plaintiff, if she has sustained her burden of proof, is entitled to compensation as follows:

Hospital and funeral expenses, loss of financial support which decedent made and would have continued to make during his lifetime; loss of decedent's services to his wife and around the house; loss of decedent's contribution, for example, to the plaintiff for psychiatric care. At the time of the accident the plaintiff claims that her husband was

earning approximately $10,000 a year. According to the life expectancy tables of a government agency, decedent had a life expectancy of 41 years. In awarding damages in this case, you may take this fact into consideration.

Plaintiff is also entitled to recover for loss of care, advice, nurture, religious guidance and companionship which her deceased husband gave to her, and to each of her three children.

You should not be concerned, and I am sure you will not be, with who and what the plaintiff is, or what the defendant is. The fact that the defendant is a town must not be taken into account in your deliberations at all. All litigants stand equal before the law. Your sworn duty is to decide the issues in this case fairly and impartially upon the evidence and these instructions on the law.

Each juror is entitled to his or her own opinion. But you are required to exchange your views with your fellow jurors when you retire to the jury room to deliberate. That is the very purpose of jury deliberations. It is your duty to discuss the evidence. If you have a point of view and if after reasoning with other jurors it appears that your judgment is opposite the question, then, of course, you should have no hesitancy in yielding your point of view, that is only if you are convinced that the opposite point of view is really one that satisfies your own judgment and conscience.

However, you are not to give up a point of view that you conscientiously believe in simply because you are outnumbered and outweighed.

When you retire to the jury room you may also send for any exhibits which you wish to see or have any testimony read back.

Will counsel please approach the bench.

(In the robing room.)

The Court: Are there any exceptions to the charge, Mr. Julien?

Mr. Julien: I don't have an exception as such, your Honor, but I do want to suggest to you that you somehow

overlooked mentioning it, as I am sure you intended to, when you were talking about expert witness, there was a particular one here, Mr. Spratt, the engineer.

Mr. Levy: You charged generally on expert witnesses.

Mr. Julien: I thought I would bring it to your attention.

The Court: He came in very early.

Mr. Julien: Other than that I have no exceptions.

The Court: Mr. Levy.

Mr. Levy: I have one exception, your Honor. I think that the portion of your charge where you included a statement to the jury that they may consider the training or lack of training of a police officer with respect to this being in any way a proximate cause of the happening of this accident—that is the only exception I have.

The Court: All right.

(In open court; 2:40 P.M.)

The Court: Ladies and gentlemen, before you actually retire I would like to excuse the alternate juror, Mr. William Torres. Mr. Torres, on behalf of the citizens of the Southern District of New York, this Court thanks you for your service on this jury. I am sorry that you will not have an opportunity to deliberate after sitting through this trial, but that is often the fate of all the jurors.

Thank you very much.

Swear the marshals.

(Marshals sworn.)

The Court: All right, ladies and gentlemen, you may now retire to deliberate.

(Jury retired at 2:40 P.M. to begin their deliberations.)

The Court: Gentlemen, jurors sometimes send out notes, as you know, and ask for exhibits, so please don't disappear. We had that in the last case. It took us an hour to find the lawyer.

(Note from the jury at 3:00 P.M.)

The Court: We have a note from the jurors, gentlemen, which shall be marked Court Exhibit 1.

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